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In the Supreme Court of the United States

OCTOBER TERM, 1989

HAROLD DAVIS AND ENID DAVIS, PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether amounts paid by petitioners directly to their children to cover their children's living expenses while they served as church missionaries are deductible by petitioners as charitable contributions under Section 170(a) of the Internal Revenue Code (26 U.S.C.).

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statute and regulation involved	1
Statement	2
Summary of argument	6
Argument:	
The payments made by petitioners to their sons to cover the sons' living expenses while they served as missionaries are not deductible as charitable contributions under Section 170 of the Internal Revenue Code	9
A. Petitioners' payments to support their children were not "to or for the use of" the Church within the meaning of Section 170 of the Code	10
1. The basic system established by Congress ensures that deductible contributions will advance the public good by requiring that such contributions be transferred to the effective control of a qualified charitable organization	10
2. Payments withheld from the control of a charitable organization by earmarking them to benefit a particular individual are not deductible	17
3. Petitioners' direct payments to their children for living expenses were committed to the control of an individual, not the Church, and hence are not deductible as made "to or for the use of" the Church under Section 170	21

Page

B. Petitioners' novel and exceedingly broad interpretations of the phrase "to or for the use of" are erroneous 24
1. Section 170 does not permit the deduction of payments made to individuals simply because the payments confer some benefit upon a charitable organization 24
2. The Church's estimate of a missionary's likely expenses and its review of his activities do not establish "control" over the disposition of his personal funds sufficient to justify a deduction for payments that parents make to their missionary children 32
3. The payments in question are not deductible on the theory that they were made "to" the Church because petitioners' sons were acting as "agents" of the Church in accepting the payments and spending the funds on their own living expenses 36
C. Petitioners' payments to support their children are not deductible as "unreimbursed expenditures" within the meaning of Treas. Reg. § 1.170A-1(g) 38

Conclusion 44

TABLE OF AUTHORITIES

Cases:

Babilonia v. *Commissioner*, 681 F.2d 678 (9th Cir. 1982) 38
Better Business Bureau v. *United States*, 326 U.S. 279 (1945) 32
Blue Chip Stamps v. *Manor Drug Stores*, 421 U.S. 723 (1975) 24
Bob Jones University v. *United States*, 461 U.S. 574 (1983) 10, 12, 13, 14

Cases – Continued:

Page

Bowman v. *Commissioner*, 16 B.T.A. 1157 (1929) 28
Brandl v. *Commissioner*, 513 F.2d 697 (6th Cir. 1975) 42
Brinley v. *Commissioner*, 82 T.C. 932 (1984), rev'd, 782 F.2d 1326 (5th Cir. 1986) 23, 37, 38, 39, 40, 42
Brinley v. *Commissioner*, 782 F.2d 1326 (5th Cir. 1986) 15, 22, 23, 32, 35, 37, 41, 42, 43
Chartwell Communications Group v. *Westbrook*, 637 F.2d 459 (6th Cir. 1980) 25
Commissioner v. *Flowers*, 326 U.S. 465 (1946) 42
Commissioner v. *National Alfalfa Dehydrating & Milling Co.*, 417 U.S. 134 (1974) 10, 32
Cook v. *Commissioner*, 37 T.C.M. (CCH) 771 (1978) 20
Danz v. *Commissioner*, 18 T.C. 454 (1952), aff'd, 231 F.2d 673 (9th Cir. 1955), cert. denied, 352 U.S. 828 (1956) 28
Davenport v. *Commissioner*, 34 T.C.M. (CCH) 1585 (1975) 15, 19, 28
Davis v. *Commissioner*, 55 T.C. 416 (1970) 15, 22
Deputy v. *DuPont*, 308 U.S. 488 (1940) 39, 42
Diab v. *Commissioner*, 39 T.C.M. (CCH) 561 (1979), aff'd, 688 F.2d 842 (7th Cir. 1982) 20
Dohrmann v. *Commissioner*, 18 B.T.A. 66 (1929) . 12, 31
Helvering v. *Bliss*, 293 U.S. 144 (1934) 32
Hernandez v. *Commissioner*, 109 S. Ct. 2136 (1989) 12, 16
Herring v. *Commissioner*, 66 T.C. 308 (1976) 39
James v. *United States*, 308 F.2d 204 (9th Cir. 1962) 42
Jewett v. *Commissioner*, 455 U.S. 305 (1982) 39-40
Kain v. *Gibboney*, 101 U.S. 362 (1879) 13
Landreth Timber Co. v. *Landreth*, 471 U.S. 681 (1985) 24
Magruder v. *Supplee*, 316 U.S. 394 (1942) 42
Mayo v. *Commissioner*, 30 T.C.M. (CCH) 505 (1971) 20

Cases – Continued: Page

McCollum v. *Commissioner*, 37 T.C.M. (CCH) 1817 (1978) 41
McMillan v. *Commissioner*, 31 T.C. 1143 (1959) .. 20-21
New Colonial Ice Co. v. *Helvering*, 292 U.S. 435 (1934) 10
Orr v. *United States*, 343 F.2d 553 (5th Cir. 1965) . 22, 28, 43
Peace v. *Commissioner*, 43 T.C. 1 (1964) 19, 25
Perin v. *Carey*, 65 U.S. (24 How.) 465 (1860) 13
Peurifoy v. *Commissioner*, 358 U.S. 59 (1952) 42
Rockefeller v. *Commissioner*, 676 F.2d 35 (2d Cir. 1982) 25, 28, 29, 41
Rosenspan v. *United States*, 438 F.2d 905 (2d Cir), cert. denied, 404 U.S. 864 (1971) 42
Russell v. *Allen*, 107 U.S. 163 (1882) 13
Shutter v. *Commissioner*, 2 B.T.A. 23 (1925) 38
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Thomason v. *Commissioner*, 2 T.C. 441 (1943) ... 11, 15, 20, 21, 25, 28, 31
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Tripp v. *Commissioner*, 337 F.2d 432 (7th Cir. 1964) 18
United States v. *American Bar Endowment*, 477 U.S. 105 (1986) 16
United States v. *Ron Pair Enterprises, Inc.*, 109 S. Ct. 1026 (1989) 24
Upham v. *Commissioner*, 16 B.T.A. 950 (1929) ... 38
Wagner v. *United States*, 573 F.2d 447 (7th Cir. 1978) 25
Watt v. *Alaska*, 451 U.S. 259 (1981) 24
White v. *United States*, 514 F. Supp. 1057 (D. Utah), rev'd, 725 F.2d 1269 (10th Cir. 1984) 15, 35, 38, 43
Wilson v. *Commissioner*, 11 T.C.M. (CCH) 159 (1952) 39

Cases – Continued: Page

Winn v. *Commissioner*, 595 F.2d 1060 (5th Cir. 1979) 18
Winters v. *Commissioner*, 468 F.2d 778 (2d Cir. 1972) 31
Wolfe v. *McCaughn*, 5 F. Supp. 407 (E.D. Pa. 1933) 38

Statutes and regulations:

Communications Act of 1934, 47 U.S.C. 605 25
Internal Revenue Code of 1954 (26 U.S.C.):
§ 170 ..... *passim*
§ 170(a) 2, 1a
§ 170(b)(1)(C) 29
§ 170(c) 2, 1a
§ 262 21
§ 7701(a)(14) 42
Revenue Act of 1918, ch. 18, § 214(a)(11), 40 Stat. 1068 11
Revenue Act of 1921, ch. 136, § 214(a)(11), 42 Stat. 241 ..... 11, 27
Tax Reform Act of 1986, Pub. L. No. 99-514, § 142(d), 100 Stat. 2120 40
War Revenue Act of 1917, ch. 63, § 1201(2), 40 Stat. 330 11
26 C.F.R. 1.70A-1(g) 1, 1a
Treas. Reg.:
§ 1.170A-1(g) 1, 5, 6, 8, 38, 39, 40, 41, 42, 43, 2a
§ 1.6012-1(a)(4) 42
§ 601.201(n)(3)(iii) 35
§ 601.201(n)(6) 15

Miscellaneous:

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Miscellaneous – Continued: Page

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H.R. Rep. No. 350, 67th Cong., 1st Sess. (1921) .. 27
H.R. Rep. No. 1860, 75th Cong., 3d Sess. (1938) .. 13
H.R. Rep. No. 1337, 83d Cong., 2d Sess. (1954). 13, 28-29
H.R. Rep. No. 749, 88th Cong., 2d Sess. (1964) ... 29
H.R. Rep. No. 413, 91st Cong., 1st Sess. Pt. 1 (1969) 13
H.R. Rep. No. 426, 99th Cong., 1st Sess. (1985) .. 40
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I.T. 1867, II-2 C.B. 155 (1923) 27
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Miscellaneous – Continued: Page

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O.D. 669, 3 C.B. 187 (1920) 11, 25
O.D. 712, 3 C.B. 188 (1920) 38
Rev. Rul. 55-275, 1955-1 C.B. 295 28
Rev. Rul. 55-4, 1955-1 C.B. 291 40
Rev. Rul. 56-508, 1956-2 C.B. 126 40
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Miscellaneous – Continued: Page

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a), as amended, is reported at 861 F.2d 558. The opinion of the district court (Pet. App. 16a-25a) is reported at 664 F. Supp. 468.

JURISDICTION

The judgment of the court of appeals was entered on November 14, 1988. A petition for rehearing was denied on April 20, 1989 (Pet. App. 27a). The petition for a writ of certiorari was filed on July 19, 1989, and the petition was granted on November 6, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE AND REGULATION INVOLVED

26 U.S.C. 170, and 26 C.F.R. 1.170A-1(g), are set out in pertinent part in an appendix to this brief.

STATEMENT

1. Petitioners and their sons, Benjamin and Cecil, are members of the Church of Jesus Christ of Latter-Day Saints (the Church) (Pet. App. 38a-39a). The Church is recognized by the IRS as an organization formed and operated for religious and charitable purposes within the meaning of Section 170 of the Internal Revenue Code of 1954 (26 U.S.C.) (Pet. App. 5a),[1] which means that contributions "to or for the use of" the Church are tax deductible (see I.R.C. § 170(a) & (c)). The Church operates a worldwide missionary program, in which approximately 25,000 missionaries have participated annually since 1977 (Pet. App. 2a).

In 1979, Benjamin Davis, who was then 18 years old, applied to become a missionary. Benjamin was accepted for two years of voluntary service, and Church officials notified him that he would be assigned to the New York City Mission. The Church later provided Benjamin with information relating to the New York City Mission and advised him of the estimated amount of money that would be required to cover his living expenses while in New York; it appears that the estimate provided by the Church was a range, rather than a specific amount (see J.A. 20). After a month's training at the Church's Missionary Training Center in Provo, Utah, Benjamin moved to New York, where he served as a missionary from November 1979 until December 1981. Pet. App. 3a, 17a, 40a-41a.

Cecil Davis also applied to become a missionary after he turned 18 years old in 1980. He was accepted for missionary service and assigned to the Church's New Zealand-Cook Island Mission. As in Benjamin's case, the Church provided Cecil with information about his mission and an estimate of the amount he would need for his expenses. In August 1981, after training at the Missionary Training Center, he reported to the New Zealand-Cook Island Mission. Pet. App. 3a, 17a-18a, 42a-43a.

[1] Unless otherwise noted, statutory references are to the Internal Revenue Code of 1954 (26 U.S.C.), as amended (the Code or I.R.C.).

During 1980 and 1981, while Benjamin was serving as a missionary in New York, petitioners transferred $3,481 and $4,135, respectively, to his personal checking account, on which he was the sole authorized signatory. Benjamin used the funds primarily to pay for his living expenses, such as rent, food, and transportation. A small portion of these funds was used to purchase religious materials utilized in his missionary work. During 1981, while Cecil was serving as a missionary, petitioners transferred $1,518 to his personal checking account, on which he was the sole authorized signatory. Cecil used these funds to pay for his living expenses and personal needs, and spent nothing for religious materials. Pet. App. 3a-4a, 17a-18a, 41a-42a.

Benjamin and Cecil were not required to seek Church approval of expenditures made from their personal checking accounts, and, in fact, they did not do so. Each week they submitted a report to their Mission President and Zone Leader describing the amount of time spent in Church service, the type of missionary work accomplished, and other matters of concern. The report also contained a statement of the total expenses for the week, but the expenses were not itemized. They were not required to turn over to the Church funds that were unexpended at the conclusion of the mission. Cecil had no such remaining funds; Benjamin purchased a camera with his funds shortly before he terminated his mission. At no time during their missions did Benjamin or Cecil accept contributions from third parties to be turned over to the Church. Pet. App. 4a, 9a, 17a-18a, 24a, 42a-43a; J.A. 21.

2. Petitioners timely filed joint income tax returns for 1980 and 1981, claiming Benjamin and Cecil as dependents. On these returns, they did not claim any charitable contribution deduction for the support payments made to their sons during those years. In 1984, petitioners filed amended income tax returns, claiming charitable contribution deductions of $3,481 and $4,882 for the amounts transferred to their sons while they served as missionaries. The Internal Revenue Service (IRS) disallowed the refund claims based on these claimed deductions, and petitioners then instituted this refund suit in the United

States District Court for the District of Idaho. Subsequently, petitioners filed a second set of amended returns in 1986. On these returns, petitioners did not claim Benjamin as a dependent. Petitioners also altered the amount of their charitable deductions to correspond to the estimate of living expenses that had been projected by the Church in the letters sent to their sons concerning their missions, slightly reducing the claimed deduction for 1980 and increasing the claimed deduction for 1981 to reflect amounts paid to both Cecil and Benjamin. See Pet. App. 18a, 45a.[2]

The district court granted summary judgment for the government (Pet. App. 16a-25a). The court held that the transfers made by the parents to their sons were not "to or for the use of" a qualified charity within the meaning of Section 170(a) of the Code, and hence were not deductible by petitioners (Pet. App. 23a-24a). Citing several decisions by the Tax Court and the courts of appeals, the court stated that, when a taxpayer asserts that a payment he makes to another individual should be deductible on the theory that it is "for the use of" of a charitable organization, he must show that the charity "control[s]" the contribution—*i.e.*, that "the charity has sufficient possession of the contribution so that it has discretion as to the use to which the donated funds will be put" (*id.* at 24a). The court concluded

[2] The effect of the change for 1980 was to reduce the claimed deduction by $255, from $3,481 to $3,126. For 1981, the effect was to increase the total claimed deduction from $4,882 to $5,653. (It appears that petitioners failed to include support payments made to Cecil in the deduction claimed on their first amended return for 1981.) Petitioners contended that they were entitled both to claim an exemption for Cecil as a dependent for 1981 and to take a charitable contribution deduction for support payments made to him during his missionary service in that year. The rationale given for this treatment was that petitioners had paid more for Cecil's support during the first part of 1981, during which he was a student at Brigham Young University, than they had paid for his support during his missionary service in the latter part of that year; accordingly, petitioners maintained, even if the support payments for which deductions were claimed were excluded, petitioners had still paid more than half of Cecil's support for the taxable year and were entitled to claim him as a dependent. See Exhibits E and F to the United States' Statement of Material Fact; see also J.A. 15-16.

that, in this case, control of the funds clearly lay with petitioners' sons, not with the Church, because "[t]he particular use to which the funds were put was solely within the power of the missionary" (*ibid.*). The court added (*ibid.*):

> It appears from the record before the court that the only role the church played in the distribution of the funds to the missionaries was to provide a projected budget range that would be needed for the particular area in which the missionary would be serving. Beyond that information provided by the church, there is no indication that the church was involved in any way in controlling how the missionary's money was spent.

The district court also ruled that petitioners' transfers were not deductible under Treas. Reg. § 1.170A-1(g) as "unreimbursed expenditures made incident to the rendition of services to" a qualified organization because such unreimbursed expenses may be deducted only by the individual who actually performs the service (Pet. App. 21a-23a).

3. The court of appeals affirmed (Pet. App. 1a-15a). The court explained that "the basic requirement that the beneficiary of a charitable contribution must be indefinite" underlies the system permitting deductions for charitable contributions (*id.* at 9a). Accordingly, the court noted, "where a taxpayer has claimed a charitable deduction for funds that have been earmarked for a specific individual, courts have considered whether the charity exercises control over the use of the funds" (*id.* at 7a). The court stated that, so long as the qualified charity retains control over the funds, the indefiniteness requirement can be satisfied, even when the taxpayer intends a contribution to be used for a specific purpose (*id.* at 9a). "But when a taxpayer makes a contribution directly to the intended beneficiary so that the charity never possesses the funds, let alone controls their use, there can be no guarantee that the beneficiary will be indefinite" (*ibid.*). The court of appeals then concluded that the Church lacked sufficient control over the funds deposited directly into the checking accounts of petitioners' sons to warrant allowing petitioners to deduct the payments as con-

tributions to the Church. The court found that, "[w]hile the Church admonished the missionaries to spend their money wisely, the particular use to which the funds were put was solely within the control of the missionaries[;] • • • other than requiring the missionaries to submit weekly reports of their expenses, the Church had no discretion over the disposition of the funds." *Ibid.*

The court of appeals also held that petitioners could not deduct the funds transferred to their sons as "unreimbursed expenditures" incurred incident to the rendition of charitable services under Treas. Reg. § 1.170A-1(g). Noting that a contrary rule would create major administrative problems and provide the opportunity for improper shifting of deductions among taxpayers, the court of appeals agreed with the district court that the regulation permits the deduction of unreimbursed expenses only by the person actually rendering the services to the charitable organization. Pet. App. 10a-14a.

SUMMARY OF ARGUMENT

A. Under Section 170 of the Code, a contribution is tax-deductible only if it is made "to or for the use of" a qualified organization. This limitation is grounded in the basic rationale underlying the charitable contribution deduction—the belief that such contributions serve the public good. An essential element of the kind of "public charity" that Congress determined to encourage is the concept of "indefiniteness" of beneficiaries. Thus, a donation to a needy individual, though motivated by altruism, is not deductible under the Code. The system established by Congress for effectuating this distinction between "public" and "private" charity depends upon the recognition of qualified organizations, which the IRS can monitor for continued compliance with the congressional standards, coupled with allowing a deduction only for contributions made "to or for the use of" those organizations.

When a payment is merely channeled through a charity, in that the charity's receipt is conditioned upon distribution of the funds to a particular individual, the payment clearly does not

advance the public good in the manner contemplated by Congress. Accordingly, the general rule has emerged that payments made to a qualified charity, but earmarked for the benefit of an individual, will be deductible only if the charity can exercise discretion over the disposition of the funds. The same analysis has been applied to the converse situation presented here—where a payment is made directly to an individual, but the taxpayer argues that the payment should be regarded as "to or for the use of" a qualified organization because of some affiliation between the individual and the organization. If the organization cannot exercise discretion over the funds, the payment does not satisfy the limitations of Section 170.

Petitioners' payments clearly do not satisfy the statutory prerequisites for deductibility. They were not dedicated to the public welfare, but were made to fund the personal expenses of petitioners' own children. And, as both courts below found, it was petitioners' children who controlled the disposition of the funds; the Church exercised no discretion over how the funds were spent.

B. The text, legislative history, and judicial and administrative constructions of Section 170 all demonstrate the error of petitioners' expansive reading of the phrase "for the use of" to cover all payments made to individuals that will confer some benefit upon a qualifying organization. The language of the statute contemplates that the organization will be able to "make use" of the funds, which entails having control over their disposition. The legislative history shows that the phrase was added in 1921 for the limited purpose of overturning a narrow administrative construction of the prior statute—namely, that a donation to a trust that invested the funds before disbursing them to charitable organizations was not a contribution "to" a qualifying organization. Thus, the IRS and the courts generally have viewed the added language as intended to convey a meaning similar to "in trust for," to permit the current deduction of payments to trusts or similar fiduciaries who receive payments from the donor for eventual distribution to qualifying charities.

The 1921 amendment was designed to build on the original scheme requiring transfer "to" a qualifying organization by slightly broadening the statute to cover closely analogous transactions. It was not intended to effect a major overhaul of that system by authorizing deductions for all payments to individuals that might incidentally benefit qualifying organizations. The broad interpretation advanced by petitioners, however, would extend the reach of Section 170 to many kinds of private payments that heretofore have never been thought to be deductible; its practical effect would be substantially to dismantle the qualified donee requirement that has been at the heart of the statutory scheme since its inception.

Petitioners' claimed deduction cannot be sustained on the theory that the Church exercised control of the support payments made to petitioners' sons. The letter sent by the Church to the sons estimating the amount of reasonable expenses may have advanced the Church's goal of ensuring that its missionaries live frugally, but it gave the Church no discretion over the disposition of the funds transferred from parent to child. And the fact that the sons reported to a Church official the total amount of their expenditures after the money was spent similarly gave the Church no discretion over the disposition of the funds.

C. Petitioners may not deduct the support payments as "unreimbursed expenditures" under Treas. Reg. § 1.170A-1(g). That regulation sets forth the general rule that a contribution of services is not deductible, but relaxes that prohibition to allow the deduction of certain unreimbursed expenses incurred in connection with providing those services. The text and structure of the regulation leave no doubt that it is intended to permit a deduction only by the taxpayer affected by the general prohibition on deducting contributions of services, *i.e.*, the taxpayer who both incurs the expense and performs the service. Moreover, if the rule were otherwise, it would open the door to manipulation by taxpayers who could shift and anticipate deductions—giving the deduction to higher-income taxpayers who can obtain a greater tax advantage from the deduction instead of the lower-income taxpayers who actually incur the expenses, and allowing the parent to make (and deduct) support payments in a tax year preceding the actual expenditure of the funds. Such consequences would be far removed from the limited purpose and effect of the regulation.

ARGUMENT

THE PAYMENTS MADE BY PETITIONERS TO THEIR SONS TO COVER THE SONS' LIVING EXPENSES WHILE THEY SERVED AS MISSIONARIES ARE NOT DEDUCTIBLE AS CHARITABLE CONTRIBUTIONS UNDER SECTION 170 OF THE INTERNAL REVENUE CODE

Petitioners directly supplied their sons with funds with which to pay the sons' living expenses while they served as missionaries on behalf of their church. Petitioners contend that these payments are tax-deductible as payments "to or for the use of" the Church within the meaning of Section 170 of the Code because the payments "primarily benefit" or "serve the * * * purposes" of the Church (see Pet. Br. 23). This contention, however, is not faithful to Congress's intent and the limitations that it has deliberately imposed on the deductibility of charitable contributions. Congress has provided that organizations meeting certain criteria should be eligible for tax-deductible donations because they contribute to the public welfare, and it has restricted tax deductions to gifts made "to or for the use of" these qualified donees. By monitoring the activities of these organizations to determine whether they continue to meet the relevant requirements and by enforcing the "qualified donee" restriction, the IRS can administer the law to effectuate Congress's intent.

Petitioners' contention would seriously undermine the effectiveness of the statutory restrictions by permitting taxpayers to avoid this linchpin of the congressional scheme—namely, that deductible contributions be transferred to the control of organizations that the government has determined serve the

charitable public purposes contemplated by Congress. Not only would that deviation from the statutorily prescribed system create enormous complications for the IRS in enforcing the Code, it also would permit taxpayers to obtain deductions for gifts that Congress did not intend to make deductible, such as benevolently motivated gifts to individuals. The result in this case would be that petitioners are entitled to a tax deduction (in some sense, a public subsidy (see *Bob Jones University* v. *United States*, 461 U.S. 574, 591 (1983)) for quintessentially personal expenses—payments made to provide food and shelter to their children. And, more generally, acceptance of petitioners' contention could open the door to the deduction of many other kinds of payments that are routinely made for personal reasons.

A. Petitioners' Payments To Support Their Children Were Not "To Or For The Use Of" The Church Within The Meaning Of Section 170 Of The Code

1. *The Basic System Established By Congress Ensures That Deductible Contributions Will Advance The Public Good By Requiring That Such Contributions Be Transferred To The Effective Control Of A Qualified Charitable Organization*

Like the other deductions from gross income permitted by the Internal Revenue Code, the deduction for charitable contributions "depends upon legislative grace; and only as there is clear provision therefor can any particular deduction be allowed." *Commissioner* v. *National Alfalfa Dehydrating & Milling Co.*, 417 U.S. 134, 149 (1974); *New Colonial Ice Co.* v. *Helvering*, 292 U.S. 435, 440 (1934). Accordingly, the resolution of this case turns on the scope of Section 170 of the Code, in which Congress has specifically permitted the deduction of certain charitable donations and delineated the limitations on that deduction. That provision defines a "charitable contribution," for which a deduction from gross income generally is allowed, as a "contribution or gift to or for the use of" eligible organizations, which include entities organized and operated exclusively

for religious and charitable purposes.[3]

Section 170 of the Code dates back to Section 1201(2) of the War Revenue Act of 1917, ch. 63, 40 Stat. 330, which authorized a deduction for "[c]ontributions or gifts actually made * * * to corporations or associations organized and operated exclusively for religious, charitable, scientific, or educational purposes * * *." This provision was carried forward without any change pertinent here in Section 214(a)(11) of the Revenue Act of 1918, ch. 18, 40 Stat. 1068. Citing the statutory requirement that the gift be made "to" a qualifying organization, the Bureau of Internal Revenue took the position that this provision did not authorize deductions for contributions to a trust or foundation that received and held the donated funds for investment and ultimate disbursement for a charitable purpose, because the trust or similar entity was not itself operated exclusively for religious or charitable purposes. See O.D. 669, 3 C.B. 187 (1920). In 1921, Congress responded to the Bureau's interpretation by amending the statute to permit deductions for contributions "to or for the use of" qualifying organizations, thereby covering contributions to trusts or similar entities that administer funds for eventual distribution to a qualifying charity. Section 214(a)(11) of the Revenue Act of 1921, ch. 136, 42 Stat. 241.[4] The 1921 provision was later incorporated into the Internal Revenue Codes of 1939 and 1954.

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[3] The IRS publishes a list of organizations that qualify for tax-deductible contributions. The Church is included on this list, as it was at the time of the payments at issue. See Pet. App. 39a; IRS Publication No. 78, *Cumulative List of Organizations* 276 (1989).

[4] The legislative history of the 1921 amendment indicates that the phrase "for the use of" was added for the specific purpose of overturning this Treasury decision, and that it was not intended to effect a significant change in the statute. See 61 Cong. Rec. 5294 (1921) (amendment not "very material") (statement of Rep. Green); see generally pages 25-27, *infra*; J. Seidman, *Legislative History of Federal Income Tax Laws (1939-1861)* 838 (1938). Accordingly, the added phrase has been construed "as intended to convey a meaning similar to 'in trust for' " (*Thomason* v. *Commissioner*, 2 T.C. 441, 444 (1943)). The 1921 amendment also added the phrase "or community chest, fund, or foundation" to the description of organizations eligible to receive tax-deductible contributions.

This statutory scheme governing the deductibility of amounts claimed as charitable contributions thus has two major components. First, the payment must qualify as a "contribution" or "gift," which excludes payments made with the expectation of a commensurate return or quid pro quo. See generally *Hernandez* v. *Commissioner*, 109 S. Ct. 2136, 2143-2144 (1989). Second, even if the payment is a gift in the sense that it is made without the expectation of a return benefit, no deduction is allowed unless the contribution is made "to or for the use of" a qualified organization. This second major component, which is the one at issue here,[5] may have the effect of denying a deduction for payments that would ordinarily be regarded as motivated by a "charitable" intent, such as a donation to a needy individual. See, *e.g.*, *Dohrmann* v. *Commissioner*, 18 B.T.A. 66, 68 (1929). Nevertheless, the statutory requirement that charitable contributions be made "to or for the use of" a qualified organization is integral to the congressional scheme, and it must be scrupulously observed.

This qualified donee requirement is grounded in the basic policy underlying Section 170. The rationale for allowing a taxpayer to take a deduction for charitable contributions to private organizations is the belief that these contributions serve the public good. As this Court explained in *Bob Jones University* v. *United States*, 461 U.S. at 588, the deduction provided by Section 170 is intended "to encourage the development of private institutions that serve a useful public purpose or supplement or take the place of public institutions of the same kind." See also *id.* at 587-590 & n.11; *Trinidad* v. *Sagrada Orden de Predicadores*, 263 U.S. 578, 581 (1924) (tax exemption for charitable organizations provided "in recognition of the benefit

[5] The government's summary judgment motion rested on the argument that the payments in question here were not made "to or for the use of" a qualified organization; the government did not there dispute that petitioners' payments constituted "contributions or gifts" within the meaning of the statute. In the event that the distict court's grant of summary judgment is reversed, the question whether petitioners' payments for the living expenses of their children are "contributions or gifts" will remain open in any subsequent proceedings that may be necessary.

which the public derives from corporate activities of the class named").[6]

The legislative history reveals that this object of furthering the public welfare has always been at the forefront of Section 170 and its predecessors. In justifying the deduction when it was first proposed in 1917, one Senator explained: "For every dollar that a man contributes for these public charities, educational, scientific, or otherwise, the public gets 100 percent." 55 Cong. Rec. 6728 (1917) (statement of Sen. Hollis). See also 61 Cong. Rec. 5294 (1921) (statement of Rep. Green) ("The gifts must be made exclusively for public purposes"). Congress elaborated upon this theme when it reenacted the deduction for charitable contributions in the 1939 Code. The House Report explains (H.R. Rep. No. 1860, 75th Cong., 3d Sess. 19 (1938)): "The exemption from taxation of money or property devoted to charitable and other purposes is based upon the theory that the Government is compensated for the loss of revenue by its relief from financial burden which would otherwise have to be met by appropriations from public funds, and by the benefits resulting from the promotion of the general welfare." See also H.R. Rep. No. 1337, 83d Cong., 2d Sess. A44 (1954); S. Rep. No. 1622, 83d Cong., 2d Sess. 196 (1954).

As this Court has recognized, Congress was guided in instituting the charitable exemption and deduction provisions by the law of charitable trusts. *Bob Jones University* v. *United States*, 461 U.S. at 588 & n.12; see also H.R. Rep. No. 413, 91st Cong., 1st Sess. Pt. 1, at 35, 43 (1969). An essential characteristic of the basic idea of "public charity" that underlies charitable trust doctrine is the concept of "uncertainty" or "indefiniteness" of beneficiaries. This Court stated in *Russell* v. *Allen*, 107 U.S. 163, 167 (1882), that charitable trusts "may, and indeed must, be for the benefit of an indefinite number of per-

[6] This concept accords with the commonly understood "legal meaning" of "charity." See *Kain* v. *Gibboney*, 101 U.S. 362, 365 (1879) ("Charity is generally defined as a gift for public use. Such is its legal meaning."); *Perin* v. *Carey*, 65 U.S. (24 How.) 465, 506 (1860) ("[C]harity is a gift to a general public use.").

sons; for if all the beneficiaries are personally designated, [there is lacking] the essential element of indefiniteness, which is one characteristic of a legal charity." See also B. Hopkins, *The Law of Tax-Exempt Organizations* 72-73 (5th ed. 1987). This principle of indefiniteness is well established in trust law. Section 375 of the *Restatement (Second) on Trusts* (1959) provides: "A trust is not a charitable trust if the persons who are to benefit are not of a sufficiently large or indefinite class so that the community is interested in the enforcement of the trust." See also *id.* at Comments a, b, c, and d; G. Bogert, *The Law of Trusts and Trustees* § 363 (1977); 4 A. Scott, *The Law of Trusts* §§ 364, 375 (1967).[7]

This concept of indefiniteness of beneficiaries as a characteristic of public charity underlies the requirement that a contribution must be made to a qualified organization in order to be deductible. Organizations qualify for tax-exempt donations only if they promote the public welfare according to the standards established by Congress; accordingly, donations to these organizations are statutorily presumed to be dedicated to a public purpose in accordance with the public charity concept that is at the root of Section 170. On the other hand, payments not made to or for the use of these organizations, even if motivated by a benevolent intent to aid a needy individual, do not meet the standards established by Congress for a deduction. If the payment is directed to a specific beneficiary, the motive may be generous but it lacks the "indefiniteness" that characterizes the type of "public charity" that Congress determined to encourage in the Internal Revenue Code. As the Tax Court explained in denying a claimed deduction for a contribution made on the condition that the money be used to benefit a particular individual: "Charity begins where certainty in beneficiaries ends, for it is the uncertainty of the objects and not the mode

[7] Moreover, the Solicitor of Internal Revenue specifically looked to the law of charitable trusts in giving an early interpretation of the charitable deduction provisions of the Code; he stated that " '[a] gift is a public charity when there is a benefit to be conferred on the public at large, or some portion thereof, or upon an indefinite class of persons.' " Sol. Op. 159, III-1 C.B. 480, 482 (1924); see *Bob Jones University* v. *United States*, 461 U.S. at 590 n.15.

of relieving them which forms the essential element of charity. * * * Whenever the beneficiary is designated by name and his merit alone is to be considered, the bequest is private and not public and ceases to have the peculiar merit of a charity." *Thomason* v. *Commissioner*, 2 T.C. 441, 443-444 (1943); see also *Davis* v. *Commissioner*, 55 T.C. 416, 424-425 (1970); *Davenport* v. *Commissioner*, 34 T.C.M. (CCH) 1585, 1587 (1975).

The rule limiting deductions to payments made "to or for the use of" qualified organizations is also critical to the IRS's ability to administer the charitable deduction provisions. Because a charity can lose its tax-exempt status if it permits funds placed under its control to be spent for non-charitable purposes, it has a substantial incentive to ensure that those funds are used as Congress intended.[8] To guarantee that tax-exempt organizations spend their funds in furtherance of the public welfare, the IRS is empowered to audit their affairs and records, and it may revoke an organization's tax exemption, even retroactively, if the organization has acted inappropriately.[9] The effect of requiring donations to be placed under the control of a qualifying organization, viewed in the context of this comprehensive administrative scheme, is to enable the IRS to perform its oversight responsibilities by monitoring a relatively limited number of recipients. See *Brinley* v. *Commissioner*, 782 F.2d 1326, 1338 (5th Cir. 1986) (Hill, J., dissenting); *White* v. *United States*, 514 F. Supp. 1057, 1061 (D. Utah), rev'd, 725 F.2d 1269 (10th Cir. 1984).

The efficacy of this oversight system would be significantly hampered if taxpayers could deduct payments made, allegedly for charitable purposes, to individuals or private entities not

[8] See Shaller, *Tax Exemption of Charitable Organizations and the Deductibility of Charitable Donations: Dangerous New Tests*, 8 U. Bridgeport L. Rev. 77, 95 (1987) ("Because a qualified donee is already under scrutiny by the I.R.S., there is a greater likelihood that funds disbursed by these organizations will be used for exempt purposes.").

[9] See 26 C.F.R. 601.201(n)(6); B. Hopkins, *The Law of Tax-Exempt Organizations* 639-664 (5th ed. 1987). See generally S. Rep. No. 552, 91st Cong., 1st Sess. 52 (1969) (discussing the IRS's oversight responsibilities).

recognized by the IRS as qualified donees. Instead of monitoring the activities of a relatively circumscribed group of recognized charities, the IRS could determine the validity of claimed charitabie deductions only by audits of enormous numbers of individual taxpayers. Presumably, the IRS would have to investigate the subjective motivations for privately controlled gifts and the ultimate use made of funds given directly to individuals. Both the massive burden that this responsibility would place on the IRS and the intrusive nature of the inquiry that would be required to investigate charitable deduction claims strongly militate against a departure from the system established in Section 170, which permits the validity of a deduction to be determined largely from its external features—*i.e.*, by ascertaining whether the payment was made to a qualifying organization. See *Hernandez* v. *Commissioner*, 109 S. Ct. at 2144; *United States* v. *American Bar Endowment*, 477 U.S. 105, 118 (1986).[10]

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[10] The commentators have adverted to the severe administrative difficulties that would be posed by departing from the qualified donee system. One commentator observed:

> The presence of the section 501 exemption and the section 170 deduction suggests a rationale for extending a * * * deduction to the taxpayer who gives cash or other property directly to a person likely to qualify for benefits from public charity. Why the tax system does not allow such a deduction * * * may more reflect administrative considerations and concerns about abuse and evasion than any theoretical or policy notions about subsidies and incentives. The Service would have difficulty distinguishing deductible private charitable gifts from nondeductible family support or transfers, sometimes made with the implicit or explicit expectation of some reciprocal benefits.

McNulty, *Public Policy and Private Charity: A Tax Policy Perspective*, 3 Va. Tax Rev. 229, 235 (1984); see also Note, *Does Charity Begin at Home? The Tax Status of a Payment to an Individual as a Charitable Deduction*, 83 Mich. L. Rev. 1428, 1441 (1985) ("Rather than burden the IRS with case-by-case inquiries into taxpayer motive and ultimate benefit, administrative considerations favor requiring that expense donations be sent directly to the qualified organization.")

2. *Payments Withheld From The Control Of A Charitable Organization By Earmarking Them To Benefit A Particular Individual Are Not Deductible*

Although the statutory framework erected by Congress reflects the concern that deductible contributions advance the public good, its application also encompasses the situation where a charity ultimately spends its money for a particular individual. Obviously, many charitable endeavors performed by qualified public charities, such as aid to the needy or a scholarship award, eventually result in expenditures for the benefit of a single person. Where the ultimate beneficiary is unknown to the person donating funds to the qualified organization, the statutory system works properly. It is clear that deductibility furthers Congress's intent; from the perspective of the donor, the contribution is to an indefinite beneficiary and fully accords with the notions of public charity that underlie Section 170. If the individual beneficiary is known to the donor, however, and the donation is earmarked for his benefit, allowing a deduction would run counter to the "public charity" basis for the statutory design. Where Congress has determined that a taxpayer should not be permitted to take a deduction for a gift to an individual, a taxpayer should not be permitted to evade that determination by the mechanism of using a qualified organization as a mere conduit for a payment intended to benefit a particular individual.

The courts and the IRS have grappled with the problems raised by such situations and have agreed that payments to an individual beneficiary cannot be rendered deductible simply by channeling the payments through a qualified charity. In 1962, the IRS issued Rev. Rul. 62-113, 1962-2 C.B. 10, addressing the situation of expenses paid to support missionaries. The IRS ruled that a taxpayer can properly deduct payments made to a church fund dedicated to the support of missionaries, even if the son of the taxpayer is one of the missionaries supported, so long as the taxpayer's donation is not specifically earmarked for the use of that son. The IRS explained the governing principles as follows (1962-2 C.B. at 11):

If contributions to the fund are earmarked by the donor for a particular individual, they are treated, in effect, as being gifts to the designated individual and are not deductible. However, a deduction will be allowable where it is established that a gift is intended by a donor for the use of the organization and not as a gift to an individual.

The test in each case is whether the organization has full control of the donated funds, and discretion as to their use, so as to insure that they will be used to carry out its functions and purposes.

In the instant case, the son's receipt of reimbursements from the fund is alone insufficient to require a holding that this test is not met. Accordingly, unless the taxpayer's contributions to the fund are distinctly marked by him so that they may be used only for his son or are received by the fund pursuant to a commitment or understanding that they will be so used, they may be deducted * * *.

See also Rev. Rul. 79-81, 1979-1 C.B. 107 ("donation" to college in amount of required fee and listing name of student to whose account donation could be applied is not deductible); Rev. Rul. 68-484, 1968-2 C.B. 105 (payment to scholarship fund where university selects recipient is deductible).

The courts generally have looked to similar principles relating to the organization's discretion and control over the funds when considering the deductibility of "earmarked" payments to a qualified donee. Thus, in *Tripp* v. *Commissioner*, 337 F.2d 432, 435-436 (7th Cir. 1964), the court held that a taxpayer's payments to a college scholarship fund, which he had designated to finance the education of a particular individual, were not deductible because they were "not to a general scholarship fund to be used as the college saw fit but were to be applied to the educational expenses of" the individual (*id.* at 436). In *Winn* v. *Commissioner*, 595 F.2d 1060 (5th Cir. 1979), a church sponsored several "days" to raise funds from the community to pay the expenses of a missionary being sent overseas. The court ruled that donations made to the church for this purpose were deductible because, *inter alia*, "an officer of the church took

the funds donated and dealt with them as the church wished" (*id.* at 1065). In *Peace* v. *Commissioner*, 43 T.C. 1, 7-8 (1964), the Tax Court considered the issue of contributions made to a mission for the purpose of paying the expenses of missionaries. Citing approvingly the analysis of Rev. Rul. 62-113, the court held that the contributions were deductible because "[t]he mission had exclusive control * * * of both the administration and distribution of the funds donated by the [taxpayers]" (*id.* at 7).

The principles developed in these earmarking cases have been utilized by courts in considering the converse situation presented here—where a payment is made not to a charitable organization, but directly to an individual, and the taxpayer argues that the payment should be regarded as "to or for the use of" the organization because of the individual's relationship to the organization. If no deduction is allowed for payments made "to" a qualifying organization that are earmarked for the benefit of an individual, because the condition attached to the payment prevents the organization from directing its disposition, it logically follows, *a fortiori*, that payments made *directly to an individual* cannot be deducted as "to or for the use of" a qualified organization if the organization lacks discretion over the disposition of the funds. Accordingly, as the district court below recognized (Pet. App. 23a-24a), the courts have consistently held that, where a payment is made directly to an individual or for his account, the payment cannot be regarded as "to or for the use of" an organization unless the organization exercises control over the disposition of the funds. The prevailing rule was explained by the Tax Cour. in *Davenport* v. *Commissioner*, 34 T.C.M. (CCH) 1585 (1975), where the court disallowed a deduction claimed for amounts paid by the taxpayer as rent for a house to be used by his son, the church's minister. The court stated (*id.* at 1587-1588):

> The cases are clear that the criteria for determining whether an amount is a charitable contribution is not whether the payment which is not made directly to the charity might incidentally relieve the charity of some cost

> but rather whether the payment is such that the contribution is "for the use of" the charity in a meaning similar to "in trust for." • • • [B]y making the payments directly to the landlord [the taxpayer] took the option of the [charity] with respect to its use of the funds. As we have pointed out in several cases, the charity must have full control of the funds donated in order for a taxpayer to be entitled to a charitable deduction, and such is not the situation where the funds are designated by the donor for the use of a particular individual. [11]

This approach is rooted in the fundamental distinction drawn by Congress between deductible "public" charity, which is directed at indefinite beneficiaries, and nondeductible "private" charity. Thus, in *Thomason* v. *Commissioner, supra*, the court denied a deduction for payments made to a school on behalf of an individual who was the legal ward of a welfare society. The taxpayer had claimed a deduction on the theory that the payments relieved the society of a financial burden, but the court concluded (2 T.C. at 444-445): "The sums were paid by petitioner for the benefit of a designated individual and for no other individuals or for no other purpose of the society. These contributions may not be regarded as gifts to or for the society. They were gifts to and for the benefit of this particular child and no one else." [12] See also *McMillan* v. *Commissioner*, 31 T.C.

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[11] The Tax Court repeatedly has rejected similar efforts to deduct payments made directly to missionaries or other individuals to pay their expenses, because of the organization's lack of control over the disposition of the funds. See *Diab* v. *Commissioner*, 39 T.C.M. (CCH) 561, 567 (1979), aff'd, 688 F.2d 842 (7th Cir. 1982) (deductions for payments to individuals disallowed because funds were not placed "under the direct control" of the organization); *Cook* v. *Commissioner*, 37 T.C.M. (CCH) 771, 774 (1978) (support payments made directly to ministers not deductible because the funds were not "under the direct control of" the organizations); *Mayo* v. *Commissioner*, 30 T.C.M. (CCH) 505, 507 (1971) (donation made directly to two Mennonite missionaries not deductible because not made "through established Mennonite organizational channels").

[12] By contrast, the court stated that, "if an exempt organization incurs liabilities in the general performance of its functions and requests its donors to pay their contributions to its creditors, the payments would be 'for the use of' the charity" (2 T.C. at 444).

1143, 1146-1147 (1959) (payments for expenses of child who was the responsibility of adoption agency). In sum, deduction of a contribution to an individual, whether paid directly or through a conduit, is inconsistent with the congressional design unless a qualified donee is given discretion over the disposition of the funds.

3. Petitioners' Direct Payments To Their Children For Living Expenses Were Committed To The Control Of An Individual, Not The Church, And Hence Are Not Deductible As Made "To Or For The Use Of" The Church Under Section 170

Under these principles, petitioners' claimed charitable contributions clearly cannot be regarded as having been made "to or for the use of" the Church within the meaning of Section 170. The payments were made directly to individuals for use in satisfying their personal expenses—food, shelter, and transportation.[13] Thus, the payments were not dedicated to the use of the Church or some other public purpose; rather, they were dedicated to the primarily private purpose of paying the personal expenses of the individual recipients.[14] Moreover, the in-

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[13] As a general rule, the Code does not permit the deduction of personal expenses. See I.R.C. § 262 ("Except as otherwise expressly provided in this chapter, no deduction shall be allowed for personal, living or family expenses").

[14] This is not to say that the payments *in no way* serve a public purpose. Petitioners' children were serving as missionaries of the Church, and therefore payments for their support were to some extent in furtherance of the Church's goals that have been recognized as serving a public, charitable purpose. If paid by the Church, such payments to support individual missionaries would be fully in accord with the Church's tax-exempt status. But the payment of funds to an individual to be spent on his personal living expenses directly and predominantly serves the individual's private purposes. The situation is analogous to a salary paid to an employee of a charitable organization. The payments are made directly for the personal benefit of the individual, but they

dividuals being supported here were petitioners' own sons, the "natural objects of their bounty" (*Davis* v. *Commissioner*, 55 T.C. at 424). Thus, petitioners are seeking a tax deduction for payments that they could be expected to make for their own personal reasons even if the recipients had no relationship to a charitable organization. See *Brinley* v. *Commissioner*, 782 F.2d at 1338 (Hill, J., dissenting); compare *Orr* v. *United States*, 343 F.2d 553, 557 (5th Cir. 1965) ("The words 'gift to or for the use of' will not stretch to include payments which the taxpayer would have made for non-charitable reasons."). Indeed, the record shows that petitioners were supporting Cecil before he began his missionary service (J.A. 15-16); their contention that the continuation of this support was transformed from a personal expense to a charitable contribution because Cecil decided to leave school and serve as a missionary stretches Section 170 well beyond its language and the apparent intent of Congress.

The payments here plainly did not satisfy the requirements discussed above for establishing deductibility. The Church never took possession of the funds or had any opportunity to use them or to exercise any discretion or control over how they would be spent. The district court found (Pet. App. 24a):

> [I]t is clear that the missionary sons had true "control" over the funds in question. * * * The particular use to which the funds were put was solely within the power of the missionary. * * * [T]he only role the church played in the distribution of the funds to the missionaries was to provide a projected budget range that would be needed for the particular area in which the missionary would be serving.

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indirectly benefit the charity—and further its public purposes—because the employee's services assist the charity in its mission and the employee will not provide those services unless he is paid a salary on which he can live. Similarly here, the support payments to the missionaries directly confer a private, personal benefit upon them—by enabling them to obtain food, lodging, and other necessities; the payments confer a more attenuated benefit upon the Church by making it possible for the missionaries to conduct their work.

> Beyond that information provided by the church, there is no indication that the church was involved in any way in controlling how the missionary's money was spent.

Petitioners placed the funds directly into their sons' personal bank accounts, and the sons were free to spend the money as they saw fit. Thus, as the court of appeals concluded, "the particular use to which the funds were put was solely within the control of the missionaries[;] * * * other than requiring the missionaries to submit weekly reports of their expenses, the Church had no discretion over the disposition of the funds" (*id.* at 9a). Moreover, the Tax Court unanimously reached the same conclusion on essentially identical facts in its reviewed decision in *Brinley* v. *Commissioner*, 82 T.C. 932 (1984), rev'd, 782 F.2d 1326 (5th Cir. 1986), holding that "since the funds were given directly to petitioners' son for his personal use and could be expended by their son as he wished without accounting to anyone, petitioners' contributions did not satisfy the control requirement" (82 T.C. at 933) and hence were not deductible under Section 170. See also 82 T.C. at 939-941; *Brinley* v. *Commisioner* 782 F.2d at 1339-1341 (Hill, J., dissenting). In sum, whatever petitioners' motivation, and notwithstanding any incidental benefit enjoyed by the Church, petitioners' transfer of funds to the control of their own children does not qualify as the kind of charitable contribution for which Congress provided a deduction in Section 170.[15]

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[15] The commentators generally have agreed with the position adopted by the court below, criticizing those decisions that have allowed deductions for payments to support the taxpayer's child during his missionary service. See Shaller, *supra*; Blasi & Denesha, *Avoiding Disallowance of Earmarked Charitable Contributions*, 9 Rev. of Tax'n of Individuals 160, 169-170 (1985); Note, *Charitable Deductions for Missionary Support: Conflict Between* White *and* Brinley, 5 Va. Tax. Rev. 203 (1985); Note, *Does Charity Begin at Home? The Tax Status of a Payment to an Individual as a Charitable Deduction*, 83 Mich. L. Rev. 1428 (1985); Note, White *v.* United States: *Tenth Circuit Allows Parents "Charitable Contribution" Deduction for Support Payments Made Directly to Mormon Missionary Son*, 62 Den. U.L. Rev. 331 (1984); but see Note, *A Tax Deduction for Direct Charitable Transfers: The Case Against* Davis *v.* United States, 64 Wash. L. Rev. 935 (1989); Note, *Earmarked Charitable Contributions: In Search of a Standard*, 50 Mo. L. Rev. 918 (1983).

B. Petitioners' Novel And Exceedingly Broad Interpretations Of The Phrase "To Or For The Use Of" Are Erroneous

1. *Section 170 Does Not Permit The Deduction Of Payments Made To Individuals Simply Because The Payments Confer Some Benefit Upon A Charitable Organization*

Petitioners contend (Br. 17-20, 23-24) that the phrase "for the use of" connotes a common law "fiduciary relationship." Petitioners do not use this term to refer to *legal* fiduciary relationships, such as trusts or guardianships. Rather, they contend that it extends to the broad array of relationships in which one person is asked to "employ [funds] in some manner for the benefit of a third person" (Pet. Br. 17) or, indeed, to " 'those informal relations which exist wherever one man trusts in or relies upon another' " (*id.* at 24). Petitioners also maintain that "the phrase 'for the use of' is often used interchangeably with 'for the benefit of' " (*ibid.*). Petitioners conclude that Section 170 therefore permits a taxpayer to take a deduction for payments made to individuals who have this kind of informal fiduciary relationship with a qualified donee, so long as "the contribution [is] made to a third party fiduciary in a manner that will benefit a charitable organization" (Pet. Br. 24). This novel interpretation bears little relation to the text of Section 170 or to the intentions of its drafters.

As this Court has emphasized on many occasions, the " 'starting point in every case involving construction of a statute is the language itself' " (*Landreth Timber Co.* v. *Landreth*, 471 U.S. 681, 685 (1985), quoting *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 756 (1975) (Powell, J., concurring)). See also *United States* v. *Ron Pair Enterprises, Inc.*, 109 S. Ct. 1026, 1030 (1989); *Watt* v. *Alaska*, 451 U.S. 259, 265 (1981). Petitioners' interpretation of Section 170 is not supported by the statutory text. Indeed, petitioners themselves acknowledge that their position does not reflect "the ordinary meaning" of the phrase "for the use of" (see Pet. Br. 25 n.11). The statutory phrase clearly contemplates that, at some point, the charity will be able to "make use" of the donated funds. But if an organization has no authority over certain funds, it cannot "use" them in

the ordinary sense of the word. See, *e.g.*, *Webster's Third New International Dictionary* 2523-2524 (1986) (primary synonyms for "use" are "employ" or "utilize"). Consequently, if funds are transferred to a third party under circumstances that will not ultimately provide a charitable organization with discretion over their disposition, the funds would not ordinarily be regarded as having been given "for the use of" that organization. See *Peace* v. *Commissioner*, 43 T.C. at 7; *Thomason* v. *Commissioner*, 2 T.C. at 444 ("for the use of" connotes a " 'right of exclusive appropriation or enjoyment of the thing donated' ").[16]

The legislative history of Section 170 makes clear that the phrase "for the use of" was added for a relatively circumscribed purpose, not to make a significant alteration in the existing statutory system that made contributing "to" a qualified donee one of the fundamental prerequisites for a deduction. As we have noted (see page 11, *supra*), the original predecessor of Section 170 had allowed deductions only for contributions "to" charitable organizations, and the Bureau of Internal Revenue had interpreted the statute to mean that deductions could not be taken for payments made directly to trusts, community chests, and other types of charitable foundations because those organizations, although they served as conduits for contributions to qualified charities, were not themselves qualified donees. See O.D. 669, 3 C.B. 187 (1920). In *Rockefeller* v. *Commissioner*, 676 F.2d 35, 40 (2d Cir. 1982), the Second Circuit described the organizations adversely affected by the Bureau's ruling as follows: "These organizations were common

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[16] Petitioners cite (Br. 17 n.3) several cases construing the phrase "for the use of" in contracts or other documents as creating third party beneficiary rights. These decisions in no way suggest, however, that the phrase should be interpreted as meaning "for the benefit of" in Section 170 or any other statute. In contrast to these decisions construing contractual language in favor of third party beneficiaries, in *Wagner* v. *United States*, 573 F.2d 447 (7th Cir. 1978), the court held that an Indiana statute's reference to trusts "for the use of" a debtor connoted actual control and applied only to trusts in which the debtor could determine how the corpus would be spent. See also *Chartwell Communications Group* v. *Westbrook*, 637 F.2d 459, 465 (6th Cir. 1980) (construing the phrase "for the use of" in Section 605 of the Communications Act of 1934, 47 U.S.C. 605).

law trusts; legal title to the contributions remained vested in a trustee which invested the funds prior to disbursement to various charitable organizations." See also *Hearings on H.R. 8245 Before the Senate Comm. on Finance*, 67th Cong., 1st Sess. 531 (1921) [hereinafter *Senate Hearings*].

When Congress was considering the Revenue Act of 1921, representatives of these common law trusts sought legislative relief from the Bureau's ruling. In testimony before the Senate Finance Committee, various representatives of these trusts argued that a deduction should be allowed for payments made to the trusts because they merely operated as "custodian[s]" of the funds until their eventual disbursement to a qualified charity. See *Senate Hearings*, at 521-526, 530-532.[17] The witnesses advised Congress that the changes they sought were limited to expanding the statute to include payments made directly to trustees or foundations.[18] And they proposed legislation that

[17] Mr. Garfield, testifying on behalf of the Cleveland Foundation, explained his position as follows (*Senate Hearings*, at 524):

> The point where we found difficulty under the present statute was that the Internal Revenue Office held that a foundation did not come within the definition of a corporation or association organized and operated exclusively for charity, for the reason that a trust company was nominated as the trustee to hold the title. However, the trust company, as trustee, sim[illegible]ds these funds and derives no pecuniary advantage other than f[illegible]e for the actual handling of the funds: it is merely the custo[illegible]nd reinvestment; it derives no pecuniary advantage by [illegible]lationship. It is in exactly the same situation that a trust company [illegible]ld be in if a college turns over to the trust company its funds for investment and handling, which is often done. It does not change the character of the fund, but the college employs a certain bank or trust company to administer and hold its fund subject to the orders of its officers.

[18] William Greenough, representing the New York Community Trust, testified as follows (*Senate Hearings*, at 530):

> Our whole request here is that the sections of the income tax be made harmonious with this provision [of the estate tax allowing deductions for gifts not only to corporations organized for charitable purposes but also to trustees for similar purposes]. • • • That in itself is absolutely all we are asking for.

would cure this difficulty by, *inter alia*, inserting the phrase "for the use of" a qualifying organization. See *id.* at 526.

Congress complied with the request of the trust representatives and enacted Section 214(a)(11) of the Revenue Act of 1921, ch. 136, 42 Stat. 241, adding the phrase "or for the use of" to the predecessor of Section 170. The discussion of this change in the committee reports and on the floor of Congress is sparse, but it indicates that Congress did not regard this a major change in the statute, but rather one calculated to alleviate the narrow concern expressed by the trust representatives. The House Report states simply that the section "would allow the deduction, under proper restriction, of contributions or gifts to a community chest fund or foundation" (H.R. Rep. No. 350, 67th Cong., 1st Sess. 12 (1921)). See also S. Rep. No. 275, 67th Cong., 1st Sess. 18 (1921). And when asked on the floor of the House to describe the effect of the change, one of the managers of the legislation stated (61 Cong. Rec. 5294 (1921) (statement of Rep. Green)): "This somewhat enlarges it. It does not make any very material change. It broadens it somewhat."

The contemporaneous administrative and judicial interpretations agreed that the new language had a relatively narrow scope, designed to address the defect in the original statute with respect to donations made to a trust for investment and eventual distribution to charity. Shortly after the statute was amended, the Treasury ruled on the question whether a contribution to a volunteer fire company—a private, nonqualifying organization—could be deducted as "for the use of" the local municipality. I.T. 1867, II-2 C.B. 155 (1923). Stating that the "for the use of" language recently added to the statute was "intended to convey a similar meaning as 'in trust for' " (*id.* at 155), the Treasury concluded that the contribution was not deductible.[19] The deci-

[19] The Treasury decision explained (II-2 C.B. at 155):

> "[T]he contribution is made to a private corporation, to be used by that corporation, although for the benefit of the inhabitants of the municipal corporation. The donation is not for the use of such inhabitants, but for their benefit, and clearly it cannot be claimed that it is for the use of the municipal corporation • • • . It does not appear that the municipality in

sion maintained that "the phrase 'for the use of' seems to carry with it a right of exclusive appropriation or enjoyment of the thing donated" (*id.* at 156). See also, *e.g.*, Rev. Rul. 55-275, 1955-1 C.B. 295, 296; I.T. 3707, 1945 C.B. 114. And the courts have also recognized on several occasions that the language added in 1921 was intended to have a similar meaning to "in trust for"—to cover payments to an intermediary trust that ultimately will be distributed to a charity. See *Rockefeller* v. *Commissioner*, 676 F.2d at 40; *Orr* v. *United States*, 343 F.2d at 557-558; *Davenport* v. *Commissioner*, 34 T.C.M. (CCH) at 1587; *Thomason* v. *Commissioner*, 2 T.C. at 444; *Danz* v. *Commissioner*, 18 T.C. 454, 464 (1952), aff'd on other grounds, 231 F.2d 673 (9th Cir. 1955), cert. denied, 352 U.S. 828 (1956); *Bowman* v. *Commissioner*, 16 B.T.A. 1157, 1162-1164 (1929).

Congress has also evinced its understanding of the relatively narrow scope of the phrase "for the use of" in Section 170. In the 1954 Code, Congress for the first time after 1921 made the distinction between contributions "to" an organization and contributions "for the use of" an organization significant in determining the amount of the deduction. Prior to 1954, an individual's charitable contributions were limited (except in certain circumstances where unlimited deductions were allowed) to 20% of his adjusted gross income. In 1954, Congress permitted taxpayers to use an additional 10% of their income for deductible contributions made "to" a charity, but this enlargement of the ceiling expressly did not apply to contributions made "for the use of" a charity. In explaining this distinction, the congressional committees noted that its effect would be to exclude from the additional deduction "payments to a trust (where the beneficiary is a [qualified organization])". H.R. Rep. No. 1337, 83d Cong., 2d Sess. A53 (1954); S. Rep. No. 1622, 83d Cong., 2d Sess. 207 (1954).

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any way has any control over the property of the incorporated volunteer fire company or that it has any voice in the manner in which such property should be used."

In 1964, Congress made another change yielding different tax consequences for the two kinds of contributions; it provided that contributions "for the use of" a charity would no longer be eligible for the unlimited deduction granted in certain circumstances by Section 170(b)(1)(C). On this occasion, Congress explained the rationale for the distinction—namely, to encourage contributions that are transferred immediately to charity in contrast to contributions to fiduciaries that are delayed before they find their way to the qualified organization. The Senate Report stated (S. Rep. No. 830, 88th Cong., 2d Sess. 60 (1964)):

> Your committee believes that the special advantage of the unlimited charitable contribution deduction should not be made available in the case of these foundations because frequently contributions to foundations do not find their way into philanthropic endeavors for extended periods of time.

See also H.R. Rep. No. 749, 88th Cong., 2d Sess. 53 (1964) ("These • • • organizations frequently do not make contributions to the operating philanthropic organizations for extended periods of time and in the meanwhile use the funds for investment."). Thus, Congress has understood the term "for the use of" to refer to payments that, while paid by the donor to a trust or similar entity instead of directly to a qualified donee, will ultimately find their way to the control of a qualified donee.

In sum, the text, legislative history, and judicial and administrative constructions of Section 170 all indicate that it was never intended to permit the deduction of all payments that might in any way benefit a charitable organization; rather, the "for the use of" language was designed to permit the current deduction of payments to trusts or similar fiduciaries who receive payments from the donor for eventual distribution to qualifying charities. See, *e.g.*, *Rockefeller* v. *Commissioner*, 676 F.2d at 41 ("for the use of" language intended to apply to situations in which "contributions often do not reach the charitable beneficiaries for a long period of time"). There is

no justification for stretching the statutory text to extend it to transfers to "informal" fiduciaries who have no legal obligation to manage and distribute the funds to the charitable beneficiary, or, indeed, to anyone who proposes to use the funds in a way that will confer a benefit upon some charitable organization (see Pet. Br. 24). The courts below correctly concluded that Congress's insertion of the phrase "for the use of" in Section 170 was not intended to discard the fundamental requirement that deductible contributions be committed to the control of a qualifying charity. The statutory amendment merely made the statute more flexible by permitting some delay between the time a payment is deducted and the time that the funds are placed within the control of a qualified recipient. There is simply no basis for concluding that Congress intended the words "for the use of" to apply to a myriad of situations where, as here, donated funds never come within the control of a qualifying organization.[20]

Petitioners' exceedingly broad interpretation of Section 170—covering any payment that can be viewed as "for the benefit of" a charity—plainly would extend the scope of the charitable contribution deduction far beyond what Congress intended. For example, a taxpayer might regard tuition payments to a parochial school as conferring a benefit upon the school by freeing up scholarship funds for other students. Or a taxpayer might claim a deduction for payments to an indigent, taking the

[20] Petitioners devote considerable effort (see Br. 11, 16-23, 27-28) to demolishing a "straw man"—the idea that the court of appeals held that a contribution is deductible only if the taxpayer transfers it to the "actual possession" of a qualified donee. The court of appeals never formulated such a holding; its opinion acknowledged what is apparent from the face of the statute—that Section 170 covers some transfers that are not made directly "to" the actual possession of a qualified donee. See Pet. App. 9a. The court of appeals recognized, however, that the 1921 amendment was designed to build on the scheme established by Congress that had required transfer "to" a qualified donee by broadening the statute to cover other transactions that are closely analogous to such direct transfers, such as payments to a trust for eventual distribution to a charity. Contrary to petitioners' submission, that amendment did not create an entirely new scheme that authorized deductions for payments bearing no similarity to transfers to qualified donees.

view that his payments benefitted qualifying charities by relieving them of the cost of providing food and shelter for that individual. Or a taxpayer might claim a deduction for the cost of living expenses provided to a ward of a welfare society because it relieved the society of its support obligation. These types of payments, even though they might incidentally benefit qualifying organizations, have long been held not to be deductible. See, *e.g.*, *Winters* v. *Commissioner*, 468 F.2d 778 (2d Cir. 1972) (tuition payments); *Thomason* v. *Commissioner*, *supra* (support payments to ward); *Dohrmann* v. *Commissioner*, *supra* (donation to indigent).

Indeed, petitioners' interpretation would appear to authorize deductions for payments that heretofore no one has even suggested as falling within the ambit of Section 170. Many individuals work for charitable organizations for relatively low salaries or as volunteers. If their parents contribute to their support, or give them money to help purchase a car, is that contribution tax deductible? Surely the organization is benefitted if the parental support enables a valued employee to continue working for the organization, rather than moving on to a higher-paying job elsewhere. Or suppose a college student studying marine biology spends his summer as a volunteer with a group that is working to preserve aquatic wildlife habitats. Are the funds that his parents send to him to defray his living expenses for the summer deductible as "for the benefit of" some qualifying organization dedicated to wildlife preservation?

Indeed, one example closely analogous to the facts of this case plainly demonstrates that petitioners' interpretation of Section 170 is erroneous. Suppose a taxpayer recognizes a missionary on the street and says: "I admire the work that you are doing, and I would like to help." The taxpayer then offers to treat the missionary to dinner or, alternatively, gives him $10 that he spends on food. If the taxpayer had shown the same generosity to an indigent, the payment clearly would not be deductible. The payment should not be any more deductible when it is a missionary, instead of an indigent, who is the beneficiary of a free dinner, and there is no reason to suppose

that Congress intended such a result. And when the taxpayer is not a benevolent stranger, but rather is the missionary's own parents, the argument for a deduction is even weaker. In sum, petitioners' position cannot be reconciled with one of the basic underpinnings of the system erected by Congress—namely, the advancement of "public charity" by requiring tax-deductible contributions to be made "to or for the use of" qualifying organizations, not individuals.[21]

2. *The Church's Estimate Of A Missionary's Likely Expenses And Its Review Of His Activities Do Not Establish "Control" Over The Disposition Of His Personal Funds Sufficient To Justify A Deduction For Payments That Parents Make To Their Missionary Children*

Petitioners also contend (Br. 25-27) that, to the extent Section 170 requires control by a charity as a prerequisite to deductibility, that standard was satisfied here. Relying on the court of appeals' decision in *Brinley* v. *Commissioner*, *supra*, they maintain that the Church exercises both "front-end" control over the

[21] Petitioners seek to justify their expansive interpretation of the phrase "for the use of" by invoking an alleged rule of construction that Section 170 is to be "broadly construed in favor of the taxpayer" (Pet. Br. 15) or read "favorably to the taxpayer" (*id.* at 27, 42). The case that petitioners cite for this proposition (Br. 14), *Helvering* v. *Bliss*, 293 U.S. 144, 151 (1934), however, merely states that the charitable contribution deduction provision should "not • • • be narrowly construed" because it is motivated by "public policy" considerations. This statement does not suggest a general principle of construing the provisions "in favor of the taxpayer," especially in light of this Court's repeated admonition that deductions should not be allowed except to the extent "there is a clear provision therefor" (*Commissioner* v. *National Alfalfa Dehydrating & Milling Co.*, 417 U.S. at 149). Moreover, since petitioners' interpretation of the statute does not further the public policy considerations that underlie Section 170 (see pages 12-15, *supra*) because it facilitates the deduction of payments made to an individual, this observation by the Court in *Bliss* provides little support for petitioners' statutory construction. In any event, the decision of the courts below rejecting petitioners' claimed deduction does not rest on a "narrow construction" of Section 170. Rather, it is compelled by the plain meaning of the text and the relevant indicia of legislative intent. Compare *Better Business Bureau* v. *United States*, 326 U.S. 279, 283 (1945).

funds, because the claimed deduction is limited to the amount of mission expenses estimated by the Church, and "back-end" control, because the missionaries are required to submit periodic reports of their activities, including the total amount of expenditures. This "extraordinary" (Pet. Br. 12) degree of control, petitioners argue, ensures that the funds given to petitioners' sons "primarily serve[ ] the [Church's] own purposes" (*id.* at 26), and hence the payments should be regarded as "for the use of" the Church. This contention is without merit.

Sending a letter to prospective missionaries advising them of the amount of expenses they can expect to incur during their service, even if construed as a "request" to be forwarded to their parents for assistance, hardly gives the Church any meaningful control over funds transferred from parent to child. The finding of the court below that "the particular use to which the funds were put was solely within the control of the missionaries[;] • • • the Church had no discretion over the disposition of the funds" (Pet. App. 9a; see also *id.* at 24a) is unaffected by this asserted "front-end control." At most, the Church's letter provides evidence that the payments for which deductions are claimed were not intended to be frittered away on luxuries. Unless the Code provides a deduction, however, for all payments to individuals who work for charitable organizations and do not live a lavish lifestyle—which it clearly does not—the Church's letter adds nothing to petitioners' argument for deductibility.[22]

[22] The amount estimated by the Church in this case for an appropriate level of expenses plainly cannot be the final word on deductibility under Section 170. For example, suppose another denomination with a missionary program similar to that of the Church determined that its missionaries should receive a modest stipend—approximating the salary of a clerical worker—and therefore sent its missionaries a letter estimating their expenses for one year in New York at $25,000. Petitioners' theory would suggest that parents supporting their missionary child would be entitled to a $25,000 deduction; certainly their deduction would not be limited by the estimate made by the Church in this case. Moreover, suppose a third denomination sent its missionaries a letter requesting them to raise funds for their own support, but not specifying a particular figure. If the parents of one of those missionaries paid him $20,000 in support payments, could the IRS reasonably disallow a deduction for that amount, while allowing the $25,000 deduction in the previous example? Thus, the Church's letter providing the estimate has no proper bearing on the question of deductibility.

The hypotheticals discussed earlier (a: 30-32) would not be materially altered if they included a letter analogous to the ones sent by the Church to the prospective missionaries in this case. If the organization sponsoring the project to preserve aquatic habitats advised the taxpayer's son of his estimated expenses for the summer, the taxpayer's support payment would not become deductible. If a charitable organization offered someone an office job at a salary of $8,000 and noted in the letter that a comparable job at a profit-making institution would pay $12,000, the prospective employee's parents would not be entitled to a $4,000 tax deduction if they agreed to make up the difference so as to enable their child to work for the charitable organization.[23] The result should be the same here.

Petitioners' assertion of "back-end" control is no more persuasive. Missionaries are required to submit weekly reports to Church officials in which they state the total amount of their expenditures for the week. See Pet. App. 44a. Thus, *after* funds have been transferred from parent to son and then spent at the discretion of the son, a Church official is informed *that* the money has been spent; the expenditures are not itemized on the reports so he does not learn *how* the money has been spent. Plainly, this superficial post hoc reporting procedure does not give the Church control over the expenditure of the funds; it simply helps the Church monitor compliance with its policy that missionaries should live frugally. The only actual "back-end control" claimed by the Church is not over the funds, but over the mission itself; the Church assertedly retains the option of cancelling the mission if Church officials determine that the missionary is violating Church policy in financial matters (see Pet. Br. 7 n.1). But this threat (similar to a university's retention

[23] Indeed, it is not necessary to hypothesize such a letter. A successful applicant to a university typically receives a letter notifying him that he has been accepted and providing an estimate of the expenses (tuition, room and board, books, etc.) that he will incur during the school year. If a parent gives the college student the funds to cover these estimated expenses, thereby relieving the university of the need to provide any financial assistance, the acceptance letter does not confer upon the parent the right to a charitable deduction under Section 170.

of power to expel a student) has nothing to do with the only basis for petitioners' claim of a tax deduction—that they have made a contribution "to or for the use of" the Church. If a taxpayer makes a deductible contribution to a qualified organization, he does not lose that deduction if it develops that the organization was not complying with the conditions of its exemption and has its tax-exempt status revoked for the year in which the contributions were made. See 26 C.F.R. 601.201 (n)(3)(iii). Thus, if petitioners' payments to their children were "to or for the use of" the Church when made, petitioners would appear to be entitled to a deduction under their theory regardless of how the funds ultimately were spent or misspent by the missionaries.

In short, petitioners' "control" argument adds little to their basic contention that parents' payments of their children's living expenses during missionary service are deductible because the support of missionaries benefits the Church. This argument must fail. Payments earmarked for the use of a particular individual or paid directly to that individual are not deductible because the beneficiary of the contribution is not indefinite or uncertain, even if the payments indirectly benefit a qualified charity. As Judge Hill stated in his dissent in *Brinley* in rejecting petitioners' "front-end control" analysis (782 F.2d at 1340):

> Such a holding simply ignores the basic thesis that a contribution made with the intent to favor a particular individual, whether earmarked in a contribution to a charity or made to the individual directly, lacks the indefiniteness that qualifies it as a charitable contribution. The contribution made by the Brinleys simply does not meet the eligibility requirements for deductibility under a proper application of the control test.

See also *White* v. *United States*, 514 F. Supp. 1057, 1060-1061 (D. Utah), rev'd, 725 F.2d 1269 (10th Cir. 1984).

3. *The Payments In Question Are Not Deductible On The Theory That They Were Made "To" The Church Because Petitioners' Sons Were Acting As "Agents" Of The Church In Accepting The Payments And Spending The Funds On Their Own Living Expenses*

Petitioners contend (Br. 38-42) for the first time in this Court that their sons were "agents" of the Church for the purpose of receiving and spending contributions for their living expenses, and therefore the payments in question were made "to" the Church. Because this contention was not raised below, its factual underpinnings were not explored in the district court; petitioners suggest (Br. 39) that the sons' status as agents is firmly established by an internal document of the Church introduced as an appendix to the Church's amicus brief in this Court. In fact, the record is clear that "[t]he Church does not want missionaries to receive missionary expense money or other charitable contributions from third parties other than those (usually the family) whom the Church has requested to provide financial assistance" (Pet. App. 33a; J.A. 13). Thus, petitioners' contention apparently is not that their sons were agents of the Church for purposes of collecting contributions to the Church, but rather that they were agents only for the limited purpose of receiving money from their parents and spending it.

In any event, even if petitioners' factual assumptions about their sons' status as agents are correct, their claim for a Section 170 deduction is not enhanced. As we have noted (pages 17-19, *supra*), the courts have consistently upheld the Commissioner's position that "[i]f contributions to [a qualified donee] are earmarked by the donor for a particular individual, they are treated, in effect, as being gifts to the designated individual and are not deductible." Rev. Rul. 62-113, *supra*. Tuition is, of course, the paradigm example; it does not become deductible by being paid in the form of an earmarked contribution to a scholarship fund. Although petitioners appear to disagree with this line of authority, suggesting that their support payments clearly would have been deductible if they had been made directly to the Church with the proviso that the funds be remitted to their children (see Pet. Br. 40, 44), that position is untenable. The distinction between public and private generosity embodied in Section 170 would be eviscerated if a payment could be rendered deductible by the expedient of using a qualified donee as a mere conduit for the transfer of funds from the donor to an individual recipient. But all that petitioners' agency argument can accomplish is the creation of such a conduit. If petitioners gave funds to an "agent" of the Church (their missionary son) earmarked for the specific purpose of paying the living expenses of their missionary son, the case would be no different from one in which they gave the funds directly to their missionary son for that purpose (which is in fact what happened).[24] The question remains whether that payment for their son's support is deductible as "for the use of" the Church because it confers some benefit on the Church. As we have explained, the payment is not deductible because the individual donee, not the Church, exercises discretion over the use of the funds. Under the system established by Congress for ensuring that deductible contributions advance a public purpose, such a payment to the control of an individual beneficiary is not deductible.[25]

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[24] Indeed, even the court of appeals in *Brinley*, which ruled in favor of the taxpayer, recognized that the argument that the missionaries are limited agents of the Church is of little significance. The court stated that the argument "raises 'form over substance' and deviates from the real inquiry: whether the LDS Church had control over the funds and, therefore, discretion as to their use" (782 F.2d at 1335). See also the Tax Court's opinion in *Brinley*, 82 T.C. at 940-941.

[25] This system does not reflect congressional disapproval of private charity, only the conclusion that the public should not subsidize that kind of generosity. The decision of the court of appeals thus does not "force" (Pet. Br. 45) the Church to abandon its traditional way of administering its missionary program. On the contrary, the Church is free to continue to run the program according to its 160-year tradition, relying on the generosity of its members to their children. Taking a tax deduction for payments to support one's child during his mission is not a part of that longstanding tradition. The notion that such payments could be deductible is of fairly recent vintage; indeed, petitioners did not even claim the deduction on their original return filed in 1981.

C. Petitioners' Payments To Support Their Children Are Not Deductible As "Unreimbursed Expenditures" Within The Meaning Of Treas. Reg. § 1.170A-1(g)

From the earliest days of the provision allowing a deduction for charitable contributions, it has been understood that no deduction is allowable for contributions of services. See O.D. 712, 3 C.B. 188 (1920). At the same time, however, the courts recognized that individuals who rendered services to charitable organizations were entitled to deduct the amount of certain expenses, such as travel expenses, that they incurred out-of-pocket in connection with rendition of services to charity. See, *e.g.*, *Wolfe* v. *McCaughn*, 5 F. Supp. 407 (E.D. Pa. 1933); *Upham* v. *Commissioner*, 16 B.T.A. 950 (1929); *Shutter* v. *Commissioner*, 2 B.T.A. 23 (1925). This rule subsequently was embodied by the Commissioner in a formal regulation, Treas. Reg. § 1.170A-1(g), which provides, in pertinent part, as follows:

> *Contributions of services.* No deduction is allowable under section 170 for a contribution of services. However, unreimbursed expenditures made incident to the rendition of services to an organization contributions to which are deductible may constitute a deductible contribution. For example, the cost of a uniform without general utility which is required to be worn in performing donated services is deductible. Similarly, out-of-pocket transportation expenses necessarily incurred in performing donated services are deductible. Reasonable expenditures for meals and lodging necessarily incurred while away from home in the course of performing donated services also are deductible.

The courts have consistently interpreted this regulation as permitting a deduction only when the expenses primarily benefit the charity, rather than the taxpayer. See, *e.g.*, *Babilonia* v. *Commissioner*, 681 F.2d 678, 679 (9th Cir. 1982); *Brinley* v. *Commissioner*, 82 T.C. at 936-937. Relying primarily on the Tenth Circuit's decision in *White* v. *United States*, *supra*, petitioners argue (Br. 30-37) that their payments to support their sons are "unreimbursed expenditures" deductible under this regulation.

The court of appeals correctly rejected this contention on the ground that Treas. Reg. § 1.170A-1(g) does not authorize a deduction for unreimbursed expenses by anyone other than the taxpayer who actually renders the services to the qualified charity (see Pet. App. 10a-14a). The text and structure of the regulation clearly indicate that it permits a deduction only by the taxpayer who both incurs the expense and performs the service. See *Brinley* v. *Commissioner*, 82 T.C. at 938. The deduction allowed by the regulation is expressed as an exception to the general rule stated in the first sentence—that no deduction is allowed for a contribution of services. Obviously, this first sentence refers to the taxpayer's own contribution of services. Accordingly, the exception to this general rule to permit the deduction of certain expenses incurred incident to the rendition of services also refers to services rendered by the taxpayer.

Moreover, the language detailing the kind of expenses that may be deducted confirms this conclusion. Deductible expenditures for clothing must relate to articles worn "in performing donated services," transportation expenses must be "out-of-pocket" and "necessarily incurred in performing donated services," and meals and lodging expenses must be "necessarily incurred while away from home in the course of performing donated services." Each of these descriptions clearly envisions that the person entitled to the deduction is the one actually performing the donated services. If parents contribute funds to the support of their child, and the child uses those funds to cover expenses incurred in rendering services to a charity, the parents have no more incurred an "unreimbursed expenditure" than would the child's employer, if the child's expenses had been paid with money he received as wages. Compare *Deputy* v. *du Pont*, 308 U.S. 488, 493-494 (1940).[26]

The Commissioner's interpretation of his own regulation, of course, is entitled to considerable deference. See *Jewett* v. *Com-*

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[26] The Tax Court has consistently held that a taxpayer may not take a deduction for providing funds for a contribution actually made by another. See, *e.g.*, *Herring* v. *Commissioner*, 66 T.C. 308, 312 (1976); *Wilson* v. *Commissioner*, 11 T.C.M. (CCH) 159, 161 (1952).

missioner, 455 U.S. 305, 318 (1982). Moreover, the other relevant guides to the interpretation of Treas. Reg. § 1.170A-1(g) all confirm that it does not allow a taxpayer to deduct expenses incurred by another individual in connection with the latter's services to charity. The revenue ruling that was the precursor to the regulation clearly identified the taxpayer as the one providing the services to charity. The ruling stated (Rev. Rul. 55-4, 1955-1 C.B. 291): "A taxpayer who gives his services gratuitously to an association • • • and who incurs unreimbursed traveling expenses • • • may deduct the amount of such unreimbursed expenses in computing his net income • • •." See also Rev. Rul. 58-240, 1958-1 C.B. 141; Rev. Rul. 56-508, 1956-2 C.B. 126, 128-129. Congress has evinced the same understanding of Treas. Reg. § 1.170A-1(g). Section 142(d) of the Tax Reform Act of 1986, Pub. L. No. 99-514, 100 Stat. 2120, imposed limitations on the deductibility under Section 170 of unreimbursed travel expenses. The portion of the House Report addressed to this provision explained existing law as follows (H.R. Rep. No. 426, 99th Cong., 1st Scss. 119 (1985) (emphasis added)): "A taxpayer may deduct, as charitable donations, unreimbursed out-of-pocket expenses incurred incident to the rendition of services *provided by the taxpayer* to a charitable organization (Treas. Reg. Sec. 1.170A-1(g))."[27] And, as the Tax Court noted in *Brinley*, with the exception of the two recent court of appeals cases involving the same factual context as this one, the case law under Treas. Reg. § 1.170A-1(g) uniformly "has involved taxpayers incurring unreimbursed expenses incident to the rendition of services to a charity by those same taxpayers" (82 T.C. at 938).[28]

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[27] See also Staff of the Joint Comm. on Taxation, 99th Cong., 2d Sess., *General Explanation of the Tax Reform Act of 1986*, at 59 (Joint Comm. Print 1987) (deduction available where "services provided by the taxpayer"); Staff of the Joint Comm. on Taxation, 98th Cong., 2d Sess., *General Explanation of the Revenue Provisions of the Deficit Reduction Act of 1984*, at 1133 (Joint Comm. Print 1984) (deductible out-of-pocket expenses are those "incurred by a taxpayer in rendering services").

[28] Petitioners cite (Br. 36) three cases to support their contention that "unreimbursed expenses" may be deducted by a person other than the one who

Thus, to the extent (if any) that the expenses incurred by petitioners' sons in performing their missionary services for the Church may be within the ambit of Treas. Reg. § 1.170A-1(g), they can be deducted only by the sons themselves, not by petitioners.[29] It is fundamental that, in the absence of a special pro-

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renders the services to the charity, *Smith* v. *Commissioner*, 60 T.C. 988, 994 (1973); *McCollum* v. *Commissioner*, 37 T.C.M. (CCH) 1817 (1978); and *Rockefeller* v. *Commisioner*, *supra*. None of these cases stands for this proposition. In both *Smith* and *McCollum*, the parents themselves contributed services and were assisted by their young children. Hence, most of the expenses were incurred by the taxpayers incident to services that they themselves rendered; it does not appear in either case that the court's attention was called to the fact that a small portion of the expenses was attributable to persons other than the taxpayers. See *Smith*, 60 T.C. at 990-991; *McCollum*, 37 T.C.M. (CCH) at 1818-1819; see generally *Brinley* v. *Commissioner*, 782 F.2d at 1338 n.5 (Hill, J., dissenting). In *Rockefeller*, the issue was whether the deductions were "to" or "for the use of" the charity, which affected whether the taxpayers qualified under then-existing provisions for unlimited charitable deductions; the court held that the deductions were "to" the charity. The court therefore had no occasion to construe Treas. Reg. § 1.170A-1(g). The taxpayers' philanthropic activities in *Rockefeller* included the provision of services to various charitable organizations; in connection with rendering these services, the taxpayers employed others to assist them, and claimed a deduction under the regulation for the salaries and expenses of those employees. In contrast to this case, it was the Rockefellers themselves who contributed services to charity, and the deductions related to payments made by them incident to rendering those services. Thus, none of the three cases cited by petitioners considered or discussed the issue presented here. See Note, *supra*, 83 Mich. L. Rev. at 1438 n.58 ("[T]he decision in *Rockefeller* has no precedential value for the question of whether money paid by a taxpayer to reimburse another person's expenses is deductible, because that issue was not before the court.").

[29] It is questionable whether most of the expenses in this case could be deducted by the missionaries. The expenses claimed here were almost entirely for meals and lodging, which are deductible under the regulation only if incurred "away from home." In *Brinley*, the court of appeals held that the meals and lodging expenses of the missionaries there were not deductible under the regulation because their tax home was where they served on their mission, if it lasted for more than the one year that the IRS generally regards as the outside limit of a temporary stay. See 782 F.2d at 1333-1334. Moreover, even during a

vision to the contrary (such as one permitting joint returns), individual members of a family are separate taxpayers, each with his own income and deductions. See I.R.C. § 7701(a)(14); Treas. Reg. § 1.6012-1(a)(4). Petitioners' interpretation of the regulation would permit the unreimbersed expense deductions (if any) to be shifted from the sons to the parents—who can obtain a greater tax advantage from the deductions because they are in a higher income tax bracket. Any such assignment or shifting of deductions has long been rejected by this Court. See *Magruder* v. *Supplee*, 316 U.S. 394, 396 (1942) (taxes deductible only by person upon whom they are imposed); *Deputy* v. *du Pont*, 308 U.S. at 493-494 (stockholder's payment of corporation's obligation not deductible as business expense). Thus, whatever deductions might have been claimed by Benjamin and Cecil for the expenses incurred during their missionary service, petitioners cannot themselves qualify for deductions generated by their sons' service to the Church and attendant expenditures. See Note, *Charitable Deductions for Missionary Support: Conflict Between* White *and* Brinley, 5 Va. Tax Rev. at 219-220.

Apart from the problem of deduction shifting, the court below correctly noted (see Pet. App. 10a-11a) that petitioners' interpretation of Treas. Reg. § 1.170A-1(g) would provide an opportunity for forms of "taxpayer abuses" that would impose a

"temporary" business stay, the deductibility of meals and lodging expenses depends upon having a regular, or permanent tax home (*i.e.*, business headquarters) elsewhere. See *Peurifoy* v. *Commissioner*, 358 U.S. 59 (1958); *Commissioner* v. *Flowers*, 326 U.S. 465 (1946). Petitioners seek to avoid the holding in *Brinley* by asserting that, even though their missions lasted for more than one year, the missionaries here did not live in the same location for a year at a time and therefore their parents' home in Idaho should still be viewed as their tax home. But the "away from home" limitation cannot be avoided by changing one's residence every six months, especially if one lives in the same general area. If a taxpayer has neither a principal place of business nor a permanent residence, the courts have held that he has no tax home, *i.e.*, he carries his home on his back for tax purposes and cannot deduct the cost of meals and lodging as if he were always "away from home." See, *e.g.*, *Brandl* v. *Commissioner*, 513 F.2d 697, 699 (6th Cir. 1975); *Rosenspan* v. *United States*, 438 F.2d 905, 912 (2d Cir.), cert. denied, 404 U.S. 864 (1971); *James* v. *United States*, 308 F.2d 204, 207-208 (9th Cir. 1962).

"significant [enforcement] burden" on the IRS (Pet. App. 10a). There would be risk of a double deduction for a single expenditure if the parents could claim a deduction for their payments and the missionary child who actually incurs the expenses (and therefore is entitled to any applicable deduction under the plain meaning of the regulation) also claims them as deductible. Moreover, petitioners' interpretation would afford an opportunity for taxpayers to "anticipate" deductions, *i.e.*, shift them into earlier years, by having the parent make support payments to the child in a tax year preceding the actual expenditure of the funds. And examination of the validity of a taxpayer's claimed deductions under this theory would necessarily entail an intrusive inquiry into the records of a third party; only by examining the expenditures of the child could the IRS determine whether the parents' payments were applied to expenses that fall within the ambit of the regulation. See also *Brinley* v. *Commissioner*, 782 F.2d at 1337-1338 (Hill, J. dissenting); Note, *supra*, 83 Mich. L. Rev. at 1434-1435.

For all these reasons, the court of appeals correctly concluded that Treas. Reg. § 1.170A-1(g) provides no basis for a tax deduction claim by parents for funds that they transfer to their children to be used for living expenses.[30]

[30] Indeed, even if the regulation authorized a deduction for a taxpayer other than the individual rendering the services to the charity, petitioners would not satisfy the "primary benefit" prerequisite to such a deduction. The courts below did not have occasion to pass on the question, but the circumstances here do not indicate that the payments in question primarily benefitted the Church. The missionaries, of course, incurred these expenses for personal sustenance, and petitioners, by making these payments, received assurance that their children would be housed and fed. Thus, the payments here are of the sort that petitioners might well have made even for non-charitable reasons (see *Orr* v. *United States*, 343 F.2d at 557); indeed, the record shows that petitioners were supporting at least one of their sons before he was a missionary (J.A. 15-16), and they claimed both as dependents on their original return (Pet. App. 18a, 45a). Although the Church received some indirect benefit from petitioners' support of their children, the principal beneficiaries of the payments were individuals, and hence the unreimbursed expenses in question should not give rise to a deduction under Treas. Reg. § 1.170A-1(g). But see *White* v. *United States*, 725 F.2d at 1272 (finding on similar facts that Church was primary beneficiary of parents' payments to support their children).

CONCLUSION

The judgment of the court of appeals should be affirmed.
Respectfully submitted.

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APPENDIX

26 U.S.C. 170 provides in pertinent part:

(a) *Allowance of Deduction.* –

(1) *General rule.* – There shall be allowed as a deduction any charitable contribution (as defined in subsection (c)) payment of which is made within the taxable year. A charitable contribution shall be allowed as a deduction only if verified under regulations prescribed by the Secretary.

* * * * *

(c) *Charitable Contribution Defined.* – For purposes of this section, the term "charitable contribution" means a contribution or gift to or for the use of –

(1) A State, a possession of the United States, or any political subdivision of any of the foregoing, or the United States or the District of Columbia, but only if the contribution or gift is made for exclusively public purposes.

(2) A corporation, trust, or community chest, fund, or foundation –

(A) created or organized in the United States or in any possession thereof, or under the law of the United States, any State, the District of Columbia, or any possession of the United States;

(B) organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals;

(C) no part of the net earnings of which inures to the benefit of any private shareholder or individual; and

(D) which is not disqualified for tax exemption under section 501(c)(3) by reason of attempting to influence legislation, and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office.

A contribution or gift by a corporation to a trust, chest, fund, or foundation shall be deductible by reason of this paragraph only if it is to be used within the United States or any of its possessions exclusively for purposes specified in subparagraph (B).

* * * * *

The Treasury Regulations on Income Tax (1954 Code) provide in pertinent part:

§ 1.170A-1 *Charitable, etc., contributions and gifts; allowance of deduction.*

(g) Contributions of services. No deduction is allowable under section 170 for a contribution of services. However, unreimbursed expenditures made incident to the rendition of services to an organization contributions to which are deductible may constitute a deductible contribution. For example, the cost of a uniform without general utility which is required to be worn in performing donated services is deductible. Similarly, out-of-pocket transportation expenses necessarily incurred in performing donated services are deductible. Reasonable expenditures for meals and lodging necessarily incurred while away from home in the course of performing donated services also are deductible. For the purposes of this paragraph, the phrase "while away from home" has the same meaning as that phrase is used for purposes of section 162 and the regulations thereunder.

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